

# Rules and Regulations

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 15 CFR Part 922

[Docket No. 950609150-8003-04]

RIN 0648-A106

#### Jade Collection in the Monterey Bay National Marine Sanctuary; Confirmation of Effective Date

**AGENCY:** Sanctuaries and Reserves Division (SRD), Office of Ocean and Coastal Resource Management (OCRM), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

**ACTION:** Confirmation of effective date.

**SUMMARY:** On March 30, 1998, the National Oceanic and Atmospheric Administration (NOAA) published a final rule (63 FR 15083) amending the regulations and Designation Document for the Monterey Bay National Marine Sanctuary (MBNMS or Sanctuary) to allow limited, small-scale collection of jade from the Jade Cove area of the Sanctuary. Under the National Marine Sanctuaries Act, the amendment would automatically take effect at the end of 45 days, continuous session of Congress beginning on March 30 1998, unless the Governor of California certified to the Secretary of Commerce the amendment as unacceptable in State waters of the MBNMS. The 45-day review period ended on June 13, 1998. During the review period, NOAA received a letter dated May 29, 1998, from Governor Pete Wilson stating that the State of California has no objection to the amendment. This document confirms the effective date of the amendment of the MBNMS Designation Document and regulations as June 16, 1998.

**EFFECTIVE DATE:** The amendment to the MBNMS Designation Document and regulations at 15 CFR part 922, subpart M, published on March 30, 1998 (63 FR 15083) shall take effect on June 16, 1998.

**FOR FURTHER INFORMATION CONTACT:** Scott Kathey, Monterey Bay National Marine Sanctuary, 299 Foam Street, Suite D, Monterey, California 93940 or at (408) 647-4251.

(Federal Domestic Assistance Catalog Number 11.429, Marine Sanctuary Program)

**Captain Evelyn Fields,**

*Deputy Assistant Administrator for Ocean Services and Coastal Zone Management.*

[FR Doc. 98-17734 Filed 7-2-98; 8:45 am]

**BILLING CODE 3510-08-M**

## FEDERAL TRADE COMMISSION

### 16 CFR Parts 0, 1, and 3

#### Organization, General Procedures, Rules of Practice for Adjudicative Proceedings

**AGENCY:** Federal Trade Commission (FTC).

**ACTION:** Final rule.

**SUMMARY:** The Commission is revising its Rules of Practice to incorporate statutory requirements of the Small Business Regulatory Enforcement Fairness Act concerning congressional review of certain agency rules and publication of small entity guides for certain rules.

The revised rules also reflect statutory amendments to the Equal Access to Justice Act as well as technical and interpretive nonsubstantive changes to the rules governing claims under the Act.

**EFFECTIVE DATES:** These amendments are effective July 6, 1998.

**FOR FURTHER INFORMATION CONTACT:** Sandra M. Vidas, Attorney, (202) 326-2456, Office of the General Counsel, FTC, Sixth Street & Pennsylvania Avenue, N.W., Washington, D.C. 20580.

**SUPPLEMENTARY INFORMATION:** The Commission is amending Parts 0, 1, and 3 of its existing Rules of Practice to reflect the statutory provisions of the Small Business Regulatory Enforcement Fairness Act (SBREFA), Pub. L. 104-121, 110 Stat. 857 (1996) as that Act amends the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, the

Regulatory Flexibility Act (RFA), 5 U.S.C. 601-612, and the Equal Access to Justice Act (EAJA), 5 U.S.C. 504.

The Commission is amending Part 1 by adding a new Subpart M reflecting SBREFA's requirements concerning the submission of information to Congress and the Comptroller General when the agency issues or amends a rule or industry guide, or formally adopts an interpretation or policy statement that constitutes a rule within the meaning of 5 U.S.C. 804(3). The amendments also reflect SBREFA's statutory requirements with respect to publication of small entity compliance guides, and add references to the RFA and Paperwork Reduction Act, (PRA), 44 U.S.C. 3501-3520, where appropriate.

The Commission is revising its rules governing EAJA claims to reflect statutory amendments and to clarify certain provisions of the Commission's existing EAJA rules. These clarifying amendments provide, *inter alia*, additional information concerning filing time limits, procedures, and allowable expenses to assist persons eligible to file claims under the EAJA. The Commission is also amending § 0.5 of its rules, "Laws authorizing monetary claims," to include a reference to the EAJA and a new telephone contact number in the Office of the General Counsel.

The Commission has determined that these rule amendments relate to agency practice or are interpretive in nature. Accordingly, they are not subject to the notice and comment requirements of the APA, 5 U.S.C. 553(b)(A), or to the RFA, 5 U.S.C. 601-612.

The submissions required by the amended rules with respect to claims under the EAJA, 5 U.S.C. 504, do not likely constitute "the collection of information" as that term is defined by the PRA. Submission of a claim for fees occurs in connection with an administrative proceeding with respect to a specific party and is therefore exempt from PRA coverage. 5 CFR 1320.4(a)(2). In the event that an EAJA claim is subject to the requirements of the PRA, the Commission has previously received clearance for Part 3, Subpart I, of the Rules of Practice, which specifies, *inter alia*, the documentation necessary to support an application for reimbursement under the EAJA, See 16 CFR 3.81-3.83 (OMB

Control Number 3084-0047, expiration date Sept. 30, 1998).

List of Subjects

16 CFR Part 0

Organization and functions (Government agencies).

16 CFR Part 1

Administrative practice and procedure.

16 CFR Part 3

Administrative practice and procedure.

For the reasons set forth in the preamble, the Federal Trade Commission amends Title 16, Chapter 1, Subchapter A, of the Code of Federal Regulations as follows:

PART 0—ORGANIZATION

1. The authority for part 0 continues to read as follows:

Authority: See 6(g), 38 Stat. 721 (15 U.S.C. 46); 80 Stat. 383 as amended (5 U.S.C. 552).

2. Section 0.5 is revised to read as follows:

§ 0.5 Laws authorizing monetary claims.

The Commission is authorized to entertain monetary claims against it under three statutes. The Federal Tort Claims Act (28 U.S.C. 2671-2680) provides that the United States will be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful acts or omissions of its employees acting within the scope of their employment or office. The Military Personnel and Civilian Employees Claims Act of 1964 (31 U.S.C. 3701, 3721) authorizes the Commission to compensate employees' claims for damage to or loss of personal property incident to their service. The Equal Access to Justice Act (5 U.S.C. 504 and 28 U.S.C. 2412) provides that an eligible prevailing party other than the United States will be awarded fees and expenses incurred in connection with any adversary adjudicative and court proceeding, unless the adjudicative officer finds that the agency was substantially justified or that special circumstances make an award unjust. In addition, eligible parties, including certain small businesses, will be awarded fees and expenses incurred in defending against an agency demand that is substantially in excess of the final decision of the adjudicative officer and is unreasonable when compared with such decision under the facts and circumstances of the case, unless the adjudicative officer finds that the party has committed a

willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Questions may be addressed to the Office of the General Counsel, (202) 326-2462.

PART 1—GENERAL PROCEDURES

1. The authority for part 1 continues to read as follows:

Authority: Sec. 6, 38 Stat. 721 (15 U.S.C. 46), unless otherwise noted.

Subpart B—Rules and Rulemaking Under Section 18(a)(1)(B) of the FTC Act

2. The authority for Subpart B is revised to read as follows:

Authority: 15 U.S.C. 46; 15 U.S.C. 57a; 5 U.S.C. 552; sec. 212(a), Pub. L. 104-121, 110 Stat. 857 (5 U.S.C. 601 note).

3. Section 1.11(b)(4) is revised to read as follows:

§ 1.11 Commencement of a rulemaking proceeding.

\* \* \* \* \*

(b) \* \* \*

(4) The information required by the Regulatory Flexibility Act, 5 U.S.C. 601-612, and the Paperwork Reduction Act, 44 U.S.C. 3501-3520, if applicable.

4. In § 1.14 paragraph (a)(2)(vi) is revised and paragraph (a)(3) is added to read as follows:

§ 1.14 Promulgation.

(a) \* \* \*

(2) \* \* \*

(vi) The information required by the Regulatory Flexibility Act, 5 U.S.C. 601-612, and the Paperwork Reduction Act, 44 U.S.C. 3501-3520, if applicable.

(3) Small entity compliance guide. For each rule for which the Commission must prepare a final regulatory flexibility analysis, the Commission will publish one or more guides to assist small entities in complying with the rule. Such guides will be designated as "small entity compliance guides."

\* \* \* \* \*

Subpart C—Rules Promulgated Under Authority Other Than Section 18(a)(1)(B) of the FTC Act

1. The authority for Subpart C is added to read as follows:

Authority: 15 U.S.C. 46; 5 U.S.C. 552; Sec. 212(a), Pub. L. 104-121, 110 Stat. 857 (5 U.S.C. 601 note).

2. Section 1.26 is amended by adding 3 sentences to the end of paragraph (d) to read as follows:

§ 1.26 Procedure.

\* \* \* \* \*

(d) Promulgation of rules or orders. \* \* \* The Federal Register publication will contain the information required by the Paperwork Reduction Act, 44 U.S.C. 3501-3520, and the Regulatory Flexibility Act, 5 U.S.C. 601-612, if applicable. For each rule for which the Commission must prepare a final regulatory flexibility analysis, the Commission will publish one or more guides to assist small entities in complying with the rule. Such guides will be designated as "small entity compliance guides."

\* \* \* \* \*

3. Subpart M, consisting of § 1.99, is added to read as follows:

Subpart M—Submissions Under the Small Business Regulatory Enforcement Fairness Act

Authority: 5 U.S.C. 801-804.

§ 1.99 Submission of rules, guides, interpretations, and policy statements to Congress and the Comptroller General.

Whenever the Commission issues or substantively amends a rule or industry guide or formally adopts an interpretation or policy statement that constitutes a "rule" within the meaning of 5 U.S.C. 804(3), a copy of the final rule, guide, interpretation or statement, together with a concise description, the proposed effective date, and a statement of whether the rule, guide, interpretation or statement is a "major rule" within the meaning of 5 U.S.C. 804(2), will be transmitted to each House of Congress and to the Comptroller General. The material transmitted to the Comptroller General will also include any additional relevant information required by 5 U.S.C. 801(a)(1)(B). This provision generally applies to rules issued or substantively amended pursuant to §§ 1.14(c), 1.15(a), 1.19, or 1.26(d); industry guides issued pursuant to § 1.6; interpretations and policy statements formally adopted by the Commission; and any rule of agency organization, practice or procedure that substantially affects the rights or obligations of non-agency parties.

PART 3—RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS

1. The authority for part 3 continues to read as follows:

Authority: Section 6, 38 Stat. 721 (15 U.S.C. 46), unless otherwise noted.

2. Subpart I is revised to read as follows:

**Subpart I—Recovery of Awards Under the Equal Access to Justice Act in Commission Proceedings**

3.81 General provisions.

3.82 Information required from applicants.

3.83 Procedures for considering applicants.

**Authority:** 5 U.S.C. 504 and 5 U.S.C. 553(b).

**Subpart I—Recovery of Awards Under the Equal Access to Justice Act in Commission Proceedings****§ 3.81 General provisions.**

(a.) *Purpose of these rules.* The Equal Access to Justice Act, 5 U.S.C. 504 (called "the Act" in this subpart), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to adversary adjudicative proceedings under part 3 of this title. The rules in this subpart describe the parties eligible for awards, how to apply for awards, and the procedures and standards that the Commission will use to make them.

(1.) *When an eligible party will receive an award.* An eligible party will receive an award when:

(i) It prevails in the adjudicative proceeding, unless the Commission's position in the proceeding was substantially justified or special circumstances make an award unjust. Whether or not the position of the agency was substantially justified will be determined on the basis of the administrative record as a whole that is made in the adversary proceeding for which fees and other expenses are sought; or

(ii) The agency's demand is substantially in excess of the decision of the adjudicative officer, and is unreasonable when compared with that decision, under all the facts and circumstances of the case. "Demand" means the express final demand made by the agency prior to initiation of the adversary adjudication, but does not include a recitation by the agency of the statutory penalty in the administrative complaint or elsewhere when accompanied by an express demand for a lesser amount.

(b.) *When the Act applies.* (1) Section 504(a)(1) of the Act applies to any adversarial adjudicative proceeding pending before the Commission at any time after October 1, 1981. This includes proceedings begun before October 1, 1981, if final Commission action has not been taken before that date.

(2) Section 504(a)(4) applies to any adversarial adjudicative proceeding pending before the Commission at any time on or after March 29, 1996.

(c.) *Proceedings covered.* (1) The Act applies to all adjudicative proceedings

under part 3 of the rules of practice as defined in § 3.2, except hearings relating to the promulgation, amendment, or repeal of rules under the Fair Packaging and Labeling Act.

(2) [Reserved]

(d.) *Eligibility of applicants.* (1) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the adjudicative proceeding in which it seeks an award. The term "party" is defined in 5 U.S.C. 551(3). The applicant must show that it meets all conditions of eligibility set out in this subpart.

(2) The types of eligible applicants are as follows:

(i) An individual with a net worth of not more than \$2 million;

(ii) the sole owner of an unincorporated business who has a net worth of not more than \$7 million, including both personal and business interests, and not more than 500 employees;

(iii) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(iv) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees;

(v) Any other partnership, corporation, association, unit of local government, or organization with a net worth of not more than \$7 million and not more than 500 employees; and

(vi) For purposes of receiving an award for fees and expenses for defending against an excessive Commission demand, any small entity, as that term is defined under 5 U.S.C. 601.

(3) Eligibility of a party shall be determined as of the date the proceeding was initiated.

(4) An applicant who owns an unincorporated business will be considered as an "individual" rather than a "sole owner of an unincorporated business" if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(5) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

(6) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual,

corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the Administrative Law Judge determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the Administrative Law Judge may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(7) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

(e.) *Standards for awards—(1) For a prevailing party:*

(i) A prevailing applicant will receive an award for fees and expenses incurred after initiation of the adversary adjudication in connection with the entire adversary adjudication, or on a substantive portion of the adversary adjudication that is sufficiently significant and discrete to merit treatment as a separate unit unless the position of the agency was substantially justified. The burden of proof that an award should not be made to an eligible prevailing applicant is on complaint counsel, which may avoid an award by showing that its position had a reasonable basis in law and fact.

(ii) An award to prevailing party will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make an award unjust.

(2) *For a party defending against an excessive demand:*

(i) An eligible applicant will receive an award for fees and expenses incurred after initiation of the adversary adjudication related to defending against the excessive portion of a Commission demand that is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with that decision under all the facts and circumstances of the case.

(ii) An award will be denied if the applicant has committed a willful violation of law or otherwise acted in bad faith or if special circumstances make an award unjust.

(f) *Allowable fees and expenses.* (1) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(2) No award for the fee of an attorney or agent under these rules may exceed the hourly rate specified in 5 U.S.C. 504(b)(1)(A). No award to compensate an expert witness may exceed the highest rate at which the Commission paid expert witnesses for similar services at the time the fees were incurred. The appropriate rate may be obtained from the Office of the Executive Director. However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses.

(3) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the Administrative Law Judge shall consider the following:

(i) If the attorney, agent or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

(ii) The prevailing rate for similar services in the community in which the attorney, agent or witness ordinarily performs services;

(iii) The time actually spent in the representation of the applicant;

(iv) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(v) Such other factors as may bear on the value of the services provided.

(4) The reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant's case.

(5) Any award of fees or expenses under the Act is limited to fees and expenses incurred after initiation of the adversary adjudication and, with respect to excessive demands, the fees and expenses incurred in defending against the excessive portion of the demand.

(g) *Rulemaking on maximum rates for attorney fees.* If warranted by an increase in the cost of living or by special circumstances (such as limited availability of attorneys qualified to handle certain types of proceedings), the Commission may, upon its own

initiative or on petition of any interested person or group, adopt regulations providing that attorney fees may be awarded at a rate higher than the rate specified in 5 U.S.C. 504(b)(1)(A) per hour in some or all the types of proceedings covered by this part. Rulemaking under this provision will be in accordance with Rules of Practice Part 1, Subpart C of this chapter.

### **§ 3.82 Information required from applicants.**

(a) *Contents of application.* An application for an award of fees and expenses under the Act shall contain the following:

(1) Identify of the applicant and the proceeding for which the award is sought;

(2) A showing that the applicant has prevailed; or, if the applicant has not prevailed, a showing that the Commission's demand was the final demand before initiation of the adversary adjudication and that it was substantially in excess of the decision of the adjudicative officer and was unreasonable when compared with that decision;

(3) Identification of the Commission position(s) that applicant alleges was (were) not substantially justified; or, identification of the Commission's demand that is alleged to be excessive and unreasonable and an explanation as to why the demand was excessive and unreasonable;

(4) A brief description of the type and purpose of the organization or business (unless the applicant is an individual);

(5) A statement of how the applicant meets the criteria of § 3.81(d);

(6) The amount of fees and expenses incurred after the initiation of the adjudicative proceeding or, in the case of a claim for defending against an excessive demand, the amount of fees and expenses incurred after the initiation of the adjudicative proceeding attributable to the excessive portion of the demand;

(7) Any other matters the applicant wishes the Commission to consider in determining whether and in what amount an award should be made; and

(8) A written verification under oath or under penalty or perjury that the information provided is true and correct accompanied by the signature of the applicant or an authorized officer or attorney.

(b) *Net worth exhibit.* (1) Each applicant except a qualified tax-exempt organization or cooperative association must provide with its application a detailed exhibit showing the net worth of the application and any affiliates (as defined in § 3.81(d)(6)) when the

proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part. The Administrative Law Judge may require an applicant to file additional information to determine its eligibility for an award.

(2) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, if an applicant objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure, the applicant may submit that portion of the exhibit directly to the Administrative Law Judge in a sealed envelope labeled "Confidential Financial Information," accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b) (1) through (9), why public disclosure of the information would adversely affect the applicant, and why disclosure is not required in the public interest. The material in question shall be served on complaint counsel but need not be served on any other party to the proceeding. If the Administrative Law Judge finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with § 4.11.

(c) *Documentation of fees and expenses.* The application shall be accompanied by full documentation of the fees and expenses incurred after initiation of the adversary adjudication, including the cost of any study, analysis, engineering report, test, project or similar matter, for which an award is sought. With respect to a claim for fees and expenses involving an excessive demand, the application shall be accompanied by full documentation of the fees and expenses incurred after initiation of the adversary adjudication, including the cost of any study, analysis, engineering report, test, project or similar matter, for which an award is sought attributable to the portion of the demand alleged to be excessive and unreasonable. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection

with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The Administrative Law Judge may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

(d) *When an application may be filed*—(1) For a prevailing party.

(i) An application may be filed not later than 30 days after the Commission has issued an order or otherwise taken action that results in final disposition of the proceeding.

(ii) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy.

(2) *For a party defending against an excessive demand:*

(i) An application may be filed not later than 30 days after the Commission has issued an order or otherwise taken action that results in final disposition of the proceeding.

(ii) If review or reconsideration is sought or taken of a decision as to which an applicant believes the agency's demand was excessive and unreasonable, proceedings for the award of fees and expenses shall be stayed pending final disposition of the underlying controversy.

(3) For purposes of this subpart, "final disposition" means the later of—

(i) The date that the initial decision of the Administrative Law Judge becomes the decision of the Commission pursuant to § 3.51(a);

(ii) The date that the Commission issues an order disposing of any petitions for reconsideration of the Commission's final order in the proceeding; or

(iii) The date that the Commission issues a final order or any other final resolution of a proceeding, such as a consent agreement, settlement or voluntary dismissal, which is not subject to a petition for reconsideration.

### § 3.83 Procedures for considering applicants.

(a) *Filing and service of documents.* Any application for an award or other pleading or document related to an application shall be filed and served on all parties as specified in §§ 4.2 and 4.4(b) of this chapter, except as provided in § 3.82(b)(2) for confidential financial information. The date the

Office of the Secretary of the Commission receives the application is deemed the date of filing.

(b) *Answer to application.* (1) Within 30 days after service of an application, complaint counsel may file an answer to the application. Unless complaint counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b)(2) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award requested.

(2) If complaint counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted by the Administrative Law Judge upon request by complaint counsel and the applicant.

(3) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of complaint counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, complaint counsel shall include with the answer either supporting affidavits or a request for further proceedings under paragraph (f) of this section.

(c) *Reply.* Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under paragraph (f) of this section.

(d) *Comments by other parties.* Any party to a proceeding other than the applicant and complaint counsel may file comments on an application within 30 days after it is served or on an answer within 15 days after it is served. A commenting party may not participate further in proceedings on the application unless the Administrative Law Judge determines that the public interest requires such participation in order to permit full exploration of matters in the comments.

(e) *Settlement.* The applicant and complaint counsel may agree on a proposed settlement of the award before final action on the application. A proposed award settlement entered into in connection with a consent agreement covering the underlying proceeding will be considered in accordance with § 3.25. The Commission may request findings of fact or recommendations on the award settlement from the Administrative Law Judge. A proposed

award settlement entered into after the underlying proceeding has been concluded will be considered and may be approved or disapproved by the Administrative Law Judge subject to Commission review under paragraph (h) of this section. If an applicant and complaint counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

(f) *Further proceedings.* (1) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or complaint counsel, or on his or her own initiative, the Administrative Law Judge may order further proceedings, such as an informal conference, oral argument, additional written submissions or an evidentiary hearing. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible.

(2) A request that the Administrative Law Judge order further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

(g) *Decision.* The Administrative Law Judge shall issue an initial decision on the application within 30 days after closing proceedings on the application.

(1) *For a decision involving a prevailing party:* The decision shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party, and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if at issue, findings on whether the agency's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust.

(2) *For a decision involving an excessive agency demand:* The decision shall include written findings and conclusions on the applicant's eligibility and an explanation of the reasons why the agency's demand was or was not determined to be substantially in excess of the decision of the adjudicative officer and was or was not unreasonable when compared with that decision. That decision shall be based upon all the facts and circumstances of the case. The decision shall also include, if at issue, findings on whether the applicant has committed a willful violation of law or otherwise

acted in bad faith, or whether special circumstances make an award unjust.

(h) *Agency review.* Either the applicant or complaint counsel may seek review of the initial decision on the fee application by filing a notice of appeal under § 3.52(a), or the Commission may decide to review the decision on its own initiative, in accordance with § 3.53. If neither the applicant nor complaint counsel seeks review and the Commission does not take review on its own initiative, the initial decision on the application shall become a final decision of the Commission 30 days after it is issued. Whether to review a decision is a matter within the discretion of the Commission. If review is taken, the Commission will issue a final decision on the application or remand the application to the Administrative Law Judge for further proceedings.

(i) *Judicial review.* Judicial review of final Commission decisions on awards may be sought as provided in 5 U.S.C. 503(c)(2).

(j) *Payment of award.* An applicant seeking payment of an award shall submit to the Secretary of the Commission a copy of the Commission's final decision granting the award, accompanied by a statement that the applicant will not seek review of the decision in the United States courts. The agency will pay the amount awarded to the applicant within 60 days, unless judicial review of the award or of the underlying decision of the adjudicative proceeding has been sought by the applicant or any party to the proceeding.

By direction of the Commission.

**Benjamin I. Berman,**  
*Acting Secretary.*

[FR Doc. 98-17803 Filed 7-2-98; 8:45 am]

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Part 172

[Docket No. 90F-0220]

#### Food Additives Permitted for Direct Addition to Food for Human Consumption; Acesulfame Potassium

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is amending the food additive regulations to provide for

the safe use of acesulfame potassium (ACK) as a nonnutritive sweetener in nonalcoholic beverages. This action is in response to a petition filed by Hoechst Celanese Corp. (Hoechst).

**DATES:** This regulation is effective July 6, 1998; written objections and requests for a hearing by August 5, 1998.

**ADDRESSES:** Submit written objections to the Dockets Management Branch (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Patricia A. Hansen, Center for Food Safety and Applied Nutrition (HFS-206), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-418-3093.

#### SUPPLEMENTARY INFORMATION:

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#### I. Introduction

In a notice published in the **Federal Register** of July 30, 1990 (55 FR 30983), FDA announced that a food additive petition (FAP 0A4212) had been filed by Hoechst Celanese Corp. (Hoechst), Route 202-206 North, Somerville, NJ 08876, proposing that § 172.800 *Acesulfame potassium* (21 CFR 172.800) be amended to provide for the safe use of acesulfame potassium (ACK) as a nonnutritive sweetener in nonalcoholic beverages, including beverage bases. (Recently, Hoechst has reorganized; the division of Hoechst now responsible for ACK is known as Nutrinova, Inc., 25 Worlds Fair Dr., Somerset, NJ 08873.) The present petition contains data and other information relevant to the safety of ACK under the proposed conditions of use; the present petition also relies on certain data and information contained in previous petitions for ACK.

FDA's food additive regulations were first amended to permit the use of ACK on July 28, 1988 (53 FR 28379, the "dry uses final rule"), in response to a petition filed by Hoechst. In its original evaluation of the safety of ACK, FDA concluded that a review of animal feeding studies showed that there is no association between neoplastic disease (cancer) and consumption of this additive (53 FR 28379 at 28380 and 28381). The agency further concluded that ACK was safe under the conditions of use proposed in the initial petition, and amended its food additive regulations to permit the use of the sweetener.

Following publication of the dry uses final rule, the agency received timely objections from the Center for Science in the Public Interest (CSPI). CSPI submitted four separate objections, two of which asserted that the long-term studies of ACK in rodents were inadequate to evaluate ACK's potential carcinogenicity, and two of which asserted that certain of these studies showed that the additive was potentially carcinogenic. CSPI requested a stay of the regulation and also requested a hearing on each of its objections. FDA, after careful consideration of CSPI's objections, found that none of the objections raised issues of fact that justified granting a